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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JEFFREY MILLER, Defendant and Appellant.	B223023 (Los Angeles County Super. Ct. No. GA078508)

APPEAL from a judgment of the Superior Court of Los Angeles County, Janice C. Croft, Judge. Affirmed in part, reversed in part and remanded.

Pamela J. Voich, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Scott A. Taryle and Charles S. Lee, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant, Jeffrey Miller, appeals the judgment entered following his conviction, by jury trial, for willful infliction of corporal injury to a cohabitant, with prior prison term enhancements (Pen. Code, §§ 273.5, 667.5).[1] He was sentenced to state prison for a term of two years.

The judgment is affirmed in part, reversed in part, and remanded for resentencing.

BACKGROUND

Viewed in accordance with the usual rule of appellate review (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence established the following.

Defendant Miller and Michelle M. had been living together for six years. Michelle's two daughters, 17-year-old Monica and 16-year-old Danielle, lived with Miller and Michelle. On November 25, 2009, Miller and Danielle went to the liquor store together. On their way home, Miller asked Danielle if she "could look out for him." Danielle understood this to mean Miller was asking her to have sex with him. Danielle said no.

When they got back home, Michelle could see Danielle was upset and asked what was wrong. Danielle said Miller had asked her for sex. Michelle got mad and confronted Miller, who initially denied the accusation but then admitted it was true. When Michelle yelled at Miller, he pushed her to the floor. Michelle got up and continued arguing with him. Michelle testified: "I put my finger in his face because I was very upset . . . . [a]nd he said do it again, I am going to bite it. And I did it again and that is when he bit it."

Michelle denied touching Miller when she was shaking her finger at him. She was quite specific that her finger never touched him and she demonstrated how her finger was about two inches from his face. The following colloquy occurred:

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[1] All further statutory references are to the Penal Code unless otherwise specified.

"Q. Did you ever try to hit him?

"A. Not in the beginning, no, after.

"Q. After he bit it?

"A. Yeah.

"Q. But before he bit it, did you do anything that might injure him?

"A. No. Not that I can think of, no, not that I can remember, I am not sure.

"Q. All you remember is yelling and shaking your finger?

"A. Yeah, and then I just went into a panic attack.

"Q. After he bit it?

"A. Yeah."

Asked what happened after Miller bit her, Michelle testified: "That is when I really went into a panic attack and just was trying to hit him and that is when he restrained me." Michelle testified she slapped Miller twice, but he restrained her by grabbing her wrists. Michelle fell backwards onto the bed and ended up on the floor. Miller got on top of her, pinned her arms above her head, and tried to get her to calm down. Michelle was hyperventilating and screaming that she couldn't breathe. Monica and Danielle told Miller to get off her and Miller eventually did so.

Michelle testified she did not want to be at the trial:

"Q. Did you ever say you weren't going to testify?

"A. Yes, I said that."

"Q. And yet you're here testifying?

"A. Yes, because I was subpoenaed and ordered to, so I am going to do what I am ordered to do."

Danielle went to a friend's house and called the police. Officer Patrick Jenks responded to the call. Danielle, Monica and Michelle all told Jenks that Miller had bitten Michelle's finger, grabbed her by the back of the head, and thrown her to the floor. Michelle asked Jenks to obtain an emergency restraining order against Miller, which he did that same night. The next day, Jenks returned

and confirmed the witnesses' statements and had photographs taken of Michelle's injuries.

Danielle testified she and her sister were in their bedroom when they heard Miller and Michelle arguing and yelling. Danielle went into the hall and saw Miller push Michelle to the bedroom floor.

"Q. Then what happened . . . after he pushed her?

"A. Then she got . . . back up and that is when they kept arguing.

"Q. And did you see her make any motions toward him?

"A. No.

"Q. And when they were arguing again, that is when she was putting her finger in his face?

"A. Yes.

"Q. How many times did she do that?

"A. She did it twice.

"Q. And then, the second time was when he bit her?

"A. Yes.

"Q. And what did your mom do after Mr. Miller bit her?

"A. We went to go get a rag so we can wash it off and stuff.

"Q. . . . [S]o did you go get the rag as soon as you saw that her finger was bleeding?

"A. Yes."

Monica testified she came out of her bedroom and saw Michelle "laying in the hallway." Michelle "got up, and then she got mad, and she started pointing her finger at my dad's face, and that is when he started to bite her finger." "Q. Other than pointing her finger in his face, did you see your mom make any other movements toward Mr. Miller? [¶] A. No, I didn't."

Miller did not put on any evidence.

During closing argument, the prosecutor elected to try the case on the theory that the only injury Miller inflicted on Michelle in violation of section 273.5 was biting her finger.

CONTENTIONS

1. Miller contends the trial court erred by refusing to instruct the jury on self-defense.

2. The Attorney General contends the trial court erred by staying prior prison term enhancements instead of either imposing or vacating them.

DISCUSSION

1. *Trial court did not err by refusing to instruct on self-defense.*

Miller contends his conviction must be reversed because the trial court erred by refusing his request to have the jury instructed on self-defense. This claim is meritless.

a. *Legal principles.*

"In *People v. Flannel* (1979) 25 Cal.3d 668 . . . , we . . . explained that a trial court must give a requested instruction only when the defense is supported by 'substantial evidence,' that is, evidence sufficient to 'deserve consideration by the jury,' not 'whenever any evidence is presented, no matter how weak.' " (*People v. Williams* (1992) 4 Cal.4th 354, 361.) Substantial evidence is "evidence from which a jury composed of reasonable persons could conclude that the facts underlying the particular instruction exist." (*People v. Blair* (2005) 36 Cal.4th 686, 745.)

" ' "It has long been established, both in tort and criminal law, that 'the least touching' may constitute battery. In other words, *force* against the person is enough, it need not be violent or severe, it need not cause bodily harm or even pain, and it need not leave any mark." [Citation.]' " (*People v. Myers* (1998) 61 Cal.App.4th 328, 335.) "It follows that an offensive touching, although it inflicts no bodily harm, may nonetheless constitute a battery, which the victim is privileged to resist with such force as is reasonable under the circumstances."

(*Ibid*.) Based on these principles, *Myers* held the trial court had erred by refusing to instruct the jury on the defendant's right to defend himself against a battery.

b. *The self-defense instruction was properly refused.*

Myers held a self-defense instruction should have been given in a battery situation because in that case there was evidence to support the instruction. There was testimony Myers pushed the victim only after the victim began yelling and poked Myers in the chest with his finger.

The trial court here refused to instruct on self-defense, rejecting Miller's argument Michelle slapped him *before* he bit her finger. The trial court said, "[Michelle] testified on direct examination that before Mr. Miller bit her finger, she did not do anything that would injure him. She said she just yelled and shook her finger. [¶] She testified on cross-examination that it was only after he bit her finger that she . . . tried to hit him. . . . And then on redirect, she said she tried to slap him after he bit her, and that she did slap him, and then she . . . finally added that I don't recall if I slapped him before or after I got bit. *But that was after all the testimony saying that there was no hitting before*." (Italics added.) The trial court concluded, "So I do not believe there is substantial evidence to justify the self-defense instruction."

Miller challenges this reasoning, arguing: "The totality of evidence established it was Michelle who initiated the physical altercation with appellant, and appellant reacted reasonably in his attempt to avoid injury to himself and to safely diffuse the situation." But, as the trial court pointed out, the *only* testimony tending to show Michelle struck Miller before he bit her was Michelle's single, non-committal statement in this exchange:

"Q. But before he bit [your finger], did you do anything that might injure him?

"A. No. Not that I can think of, no, not that I can remember, I am not sure."

Miller reads this exchange to mean: "Michelle believed she may have slapped appellant during this initial tirade, but could not recall." This conclusion is erroneous for two reasons: a statement to the effect of "I don't recall" does not by itself constitute substantial evidence; and, Michelle's entire testimony shows she denied hitting Miller before he bit her.

A witness's inability to remember does not, by itself, constitute substantial evidence. (See *Louis & Diederich, Inc. v. Cambridge European Imports, Inc.* (1987) 189 Cal.App.3d 1574, 1591 ["In response to the question: 'Did you tell Mr. Miller about that meeting?,' the answer 'I might have,' standing alone, could conceivably sustain a finding, but that rejoinder was immediately followed by 'I don't recall.' Further probing by counsel produced nothing but Cochran's steadfast assertion of total lack of recollection. What he said in effect was: 'I have no memory whatever as to whether or not I told Miller, therefore it is possible, as everything is, that I did.' No finding can be predicated on the absence of evidence."]; see also *Horn v. Bradco Internat., Ltd.* (1991) 232 Cal.App.3d 653, 664, fn. 13 ["The only 'evidence' Horn cites . . . is a single passage in which Brady was asked on cross-examination if the true motivation for seeking a voluntary resignation was to preempt Horn's suit for wrongful termination, and he replied: 'I don't recall. It would not surprise me if that conversation took place with our counsel.' We doubt this statement is 'substantial evidence,' because it neither admits nor denies such preemption was his motivation, but simply states he could not recall one way or the other. While the statement may be a scintilla of proof [it did not constitute] substantial evidence . . . ."].)

Hence, even if the only evidence available had been Michelle's statement "Not that I can think of, no, not that I can remember, I am not sure," that would not have constituted the substantial evidence warranting a self-defense instruction.

But, of course, that wasn't the only available evidence. Michelle was very clear in her earlier testimony – throughout direct, cross and redirect examination – that she only hit Miller *after* he bit her. "[A]ny '[e]vidence, to be "substantial" must be "of ponderable legal significance . . . reasonable in nature, credible, and of solid value" ' [citation] and . . . *an appellate court considering whether there is substantial evidence to support a trial court ruling must consider the entire record* [citation]." (*Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 328, italics added.)

The trial court properly declined to instruct the jury on self-defense.

2. *Incorrect sentencing on prior prison term findings.*

The Attorney General contends the trial court impermissibly stayed prior prison term (§ 667.5, subd. (b)) enhancement findings. We agree.

The trial court stayed execution of two one-year prior prison term enhancements. The Attorney General correctly points out that, in general, a prior prison term enhancement must be either struck or imposed; it cannot simply be stayed. Trial courts must either *impose* sentence enhancements or *strike* them, but cannot simply *stay* them. "The failure to impose or strike an enhancement is a legally unauthorized sentence subject to correction for the first time on appeal. [Citations.]" (*People v. Bradley* (1998) 64 Cal.App.4th 386, 391 [regarding prior prison term enhancement]; accord *People v. Flores* (2005) 129 Cal.App.4th 174, 187-188 [gang enhancement must be either stricken or imposed; it cannot simply be stayed].)

We agree with the Attorney General the matter must be remanded so the trial court can resentence Miller on the section 667.5 findings and either strike or impose those enhancements. We shall remand to the trial court for a limited resentencing.

DISPOSITION

The judgment is affirmed in part, reversed in part and remanded for resentencing. The sentence is vacated to the extent indicated in this opinion and the matter is remanded to the trial court for a limited resentencing.

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KLEIN, P. J.

We concur:

KITCHING, J.

ALDRICH, J.